4510-29-P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Parts 2509 and 2510

RIN 1210-AB96

Conflict of Interest Rule—Retirement Investment Advice: Notice of Court Vacatur

AGENCY: Employee Benefits Security Administration, Department of Labor

ACTION: Final rule; technical amendment

SUMMARY: This document implements the vacatur of the Department's 2016 final rule defining who is a "fiduciary" under the Employee Retirement Income Security Act of 1974, as amended, and the Internal Revenue Code of 1986, as amended, and reinstates the regulation at 29 CFR 2510.3—21 as it existed before being amended by the 2016 final rule. This document also reflects the removal of two prohibited transaction exemptions (PTEs 2016-01 and 2016-02) published with the 2016 final rule and the return of the amended prohibited transaction exemptions (PTEs 75-1, 77-4, 80-83, 83-1, 84-24, and 86-128) to their pre-amendment form. In addition, this document reinstates in the CFR Interpretive Bulletin 96-1, which had been removed and largely incorporated into the text of the 2016 final rule. These revisions are ministerial to conform the contents of the Code of Federal Regulations and the text of the Department's prohibited transaction exemptions to the vacatur ordered by the United States Court of Appeals for the Fifth Circuit on June 21, 2018, in *Chamber of Commerce v. Department of Labor*, 885 F.3d 360, 363 (5th Cir. 2018).

DATES: Effective [Insert date of publication of this Technical Amendment in FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Luisa Grillo-Chope, Office of Regulations and Interpretations, Employee Benefits Security Administration (EBSA) (202) 693-8825; Susan Wilker, Office of Exemption Determinations, EBSA (202) 693-8557.

SUPPLEMENTARY INFORMATION:

On April 8, 2016, the Department of Labor published a final regulation titled "Conflict of Interest Rule—Retirement Investment Advice" (Fiduciary Rule) defining who is a "fiduciary" of an employee benefit plan under section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (ERISA) as a result of giving investment advice to a plan or its participants or beneficiaries for a fee or other compensation. The Fiduciary Rule also applied to the definition of a "fiduciary" of a plan (including an individual retirement account (IRA)) under section 4975(e)(3)(B) of the Internal Revenue Code of 1986 (Code). On the same date, the Department published two new administrative class exemptions from the prohibited transaction provisions of ERISA and the Code: the Best Interest Contract Exemption (PTE 2016-01) and the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (PTE 2016-02), as well as amendments to the following previously granted exemptions: PTEs 75-1; 77-4; 80-83; 83-1; 84-24; and 86-128 (collectively, the PTEs).

On June 21, 2018, the United States Court of Appeals for the Fifth Circuit issued a judgment and mandate vacating the Fiduciary Rule, the new PTEs, and the amendments

to the previously granted PTEs *in toto*. *Chamber of Commerce*, 885 F.3d 360 (5th Cir. 2018); Mandate at 2, *Chamber*, 885 F.3d 360 (No. 17-10238) (ECF No. 00514522178). The vacatur had the effect of reinstating the prior regulatory text, *i.e.,* the 1975 regulation[1] (1975 Regulation), reinstating Interpretive Bulletin 96-1, which had been removed and largely incorporated into the text of the Fiduciary Rule, revoking PTEs 2016-01 and 2016-02, and returning the previously granted PTEs to their pre-2016 rulemaking form. This document takes the administrative steps necessary to conform the regulatory text in the CFR and the text of the previously granted PTEs to the Fifth Circuit's vacatur mandate. This technical amendment is a ministerial action to reflect the court's decision which affects no legal rights or obligations and imposes no costs.

This final rule reflects the Fifth Circuit's vacatur of the Fiduciary Rule under section 3(21)(A)(ii) of ERISA and section 4975(e)(3)(B) of the Code. Consistent with Federal Register requirements, this final rule removes language from the CFR that the Fiduciary Rule added and reinstates the 1975 Regulation and Interpretive Bulletin 96-1. This amendment also corrects a typographical error in the original text of the 1975 Regulation, at 29 CFR 2510-3.21(e)(1)(ii).

This document also reflects the Fifth Circuit's vacatur of PTEs 2016-01 and 2016-02, the two new class exemptions granted in connection with the Fiduciary Rule, as well as the vacatur of the amendments to the previously granted exemptions, PTEs 75–1, 77–

[1] *See* 40 FR 50842–44 (Oct. 31, 1975).

4, 80–83, 83–1, 84–24 and 86–128.[2] The Department also withdraws the Proposed Best Interest Contract Exemption for Insurance Intermediaries, a related class exemption proposal that was not finalized.[3] EBSA's website will reflect all of these changes.[4]

Procedural and Other Matters

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B), provides that when an agency for good cause finds that notice and public procedures are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. The Department has determined that there is good cause for dispensing with public comments, inasmuch as this rule merely conforms the text in the CFR to reflect the mandate of the Fifth Circuit's decision, which vacated the Department's 2016 rulemaking *in toto*. Additionally, the Department finds that to provide notice and an opportunity to comment would be unnecessary because the Department is simply conducting the ministerial task of implementing the mandate issued by the Fifth Circuit.

In addition, the Department finds that it has good cause to make the revisions immediately effective under section 553(d) of the Administrative Procedure Act, 5 U.S.C. 553(d). Section 553(d) provides that final rules shall not become effective until 30 days after publication in the Federal Register, "except . . . as otherwise provided by the agency for good cause," among other exceptions. The purpose of this provision is to

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[2] The Federal Register citations for the applicable versions of the previously granted PTEs are as follows: PTE 75-1, 40 FR 50845 (Oct. 31, 1975), as amended at 71 FR 5883 (Feb. 3, 2006); PTE 77-4, 42 FR 18732 (Apr. 8, 1977); PTE 80-83, 45 FR 73189 (Nov. 4, 1980), as amended at 67 FR 9483 (March 1, 2002); PTE 83-1, 48 FR 895 (Jan. 7, 1983), as amended at 67 FR 9483 (March 1, 2002); PTE 84–24, 49 FR 13208 (Apr. 3, 1984), as corrected, 49 FR 24819 (June 15, 1984), as amended, 71 FR 5887 (Feb. 3, 2006); and PTE 86-128, 51 FR 41686 (November 18, 1986), as amended, 67 FR 64137 (October 17, 2002).

[3] *See* 82 FR 7336 (January 19, 2017).

[4] Available at https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/exemptions/class.

"give affected parties a reasonable time to adjust their behavior before the final rule takes effect." *Omnipoint Corp. v. FCC,* 78 F.3d 620, 630 (D.C. Cir. 1996). The Department has determined that there is good cause for making this final rule effective immediately because it merely implements the court order that already vacated certain regulatory provisions, and reinstates the prior versions, with one minor typographical correction. Accordingly, this final rule is effective immediately upon publication.

This final rule has been determined to be not significant for purposes of Executive Orders 12866 and 13563. Additionally, no analysis is required under the Regulatory Flexibility Act[5] or Sections 202 and 205 of the Unfunded Mandates Reform Act of 1999,[6] because, for the reasons discussed above, the Department is not required to engage in notice and comment under the Administrative Procedure Act. This final rule does not have significant Federalism implications under Executive Order 13132. This final rule is not a significant regulatory action under Executive Order 12866, and is therefore not subject to Executive Order 13771, entitled Reducing Regulations and Controlling Regulatory Costs. The final rule is not subject to the requirements of the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3501 et seq.), because it does not contain a collection of information as defined in 44 U.S.C. 3502(3).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before certain actions may take effect, the agency promulgating the action must submit a report, which includes a copy of the action, to each House of the Congress and to the Comptroller General of the United States. This final action is administrative and only

[5] *See* 5 U.S.C. 601(2) (limiting "rules" under the Regulatory Flexibility Act, to rules for which a general notice of proposed rulemaking is published).
[6] Pub. L. 104-4.

implements the Fifth Circuit vacatur. Accordingly, the Department has determined that good cause exists, and that this technical amendment is not subject to the timing requirements of the Congressional Review Act.

Statutory Authority

This regulation is issued pursuant to the authority in section 505 of ERISA (Pub. L. 93–406, 88 Stat. 894; 29 U.S.C. 1135) and section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 237, and under Secretary of Labor's Order No. 1–2011, 77 FR 1088 (Jan. 9, 2012).

List of Subjects in 29 CFR Parts 2509 and 2510

Employee benefit plans, Pensions.

For the reasons stated in the preamble, the Department is amending parts 2509 and 2510 of subchapters A and B of chapter XXV of title 29 of the Code of Federal Regulations as follows:

Subchapter A—General

PART 2509—INTERPRETIVE BULLETINS RELATING TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

1. The authority citation for part 2509 continues to read as follows:

Authority: 29 U.S.C. 1135. Secretary of Labor's Order 1–2011, 77 FR 1088 (Jan. 9, 2012). Sections 2509.75–10 and 2509.75–2 issued under 29 U.S.C. 1052, 1053, 1054. Sec. 2509.75–5 also issued under 29 U.S.C. 1002. Sec. 2509.95–1 also issued under sec. 625, Pub. L. 109–280, 120 Stat. 780

2. Add § 2509.96–1 to Part 2509 to read as follows:

§ 2509.96-1 Interpretive Bulletin Relating to Participant Investment Education.

(a) *Scope*. This interpretive bulletin sets forth the Department of Labor's interpretation of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and 29 CFR 2510.3-21(c) as applied to the provision of investment-related educational information to participants and beneficiaries in participant-directed individual account pension plans (*i.e.*, pension plans that permit participants and beneficiaries to direct the investment of assets in their individual accounts, including plans that meet the requirements of the Department's regulations at 29 CFR 2550.404c–1).

(b) *General*. Fiduciaries of an employee benefit plan are charged with carrying out their duties prudently and solely in the interest of participants and beneficiaries of the plan, and are subject to personal liability to, among other things, make good any losses to the plan resulting from a breach of their fiduciary duties. ERISA sections 403, 404 and 409, 29 U.S.C. 1103, 1104, and 1109. Section 404(c) of ERISA provides a limited exception to these rules for a pension plan that permits a participant or beneficiary to exercise control over the assets in his or her individual account. The Department of Labor's regulation, at 29 CFR 2550.404c-1, describes the kinds of plans to which section 404(c) applies, the circumstances under which a participant or beneficiary will be considered to have exercised independent control over the assets in his or her account, and the consequences of a participant's or beneficiary's exercise of such control.[1]

[1] The section 404(c) regulation conditions relief from fiduciary liability on, among other things, the participant or beneficiary being provided or having the opportunity to obtain sufficient investment information regarding the investment alternatives available under the plan in order to make informed investment decisions. Compliance with this condition, however, does not require that participants and beneficiaries be offered or provided either investment advice or investment education, *e.g.* regarding general investment principles and strategies, to assist them in making investment decisions. 29 CFR 2550.404c–1(c)(4).

With both an increase in the number of participant-directed individual account plans and the number of investment options available to participants and beneficiaries under such plans, there has been an increasing recognition of the importance of providing participants and beneficiaries whose investment decisions will directly affect their income at retirement, with information designed to assist them in making investment and retirement-related decisions appropriate to their particular situations. Concerns have been raised, however, that the provision of such information may in some situations be viewed as rendering "investment advice for a fee or other compensation," within the meaning of ERISA section 3(21)(A)(ii), thereby giving rise to fiduciary status and potential liability under ERISA for investment decisions of plan participants and beneficiaries.

In response to these concerns, the Department of Labor is clarifying herein the applicability of ERISA section 3(21)(A)(ii) and 29 CFR 2510.3–21(c) to the provision of investment-related educational information to participants and beneficiaries in participant directed individual account plans.[2] In providing this clarification, the Department does not address the "fee or other compensation, direct or indirect," which is a necessary element of fiduciary status under ERISA section 3(21)(A)(ii).[3]

[2] Issues relating to the circumstances under which information provided to participants and beneficiaries may affect a participant's or beneficiary's ability to exercise independent control over the assets in his or her account for purposes of relief from fiduciary liability under ERISA section 404(c) are beyond the scope of this interpretive bulletin. Accordingly, no inferences should be drawn regarding such issues. See 29 CFR 2550.404c–1(c)(2). It is the view of the Department, however, that the provision of investment-related information and material to participants and beneficiaries in accordance with paragraph (d) of this interpretive bulletin will not, in and of itself, affect the availability of relief under section 404(c).

[3]The Department has expressed the view that, for purposes of section 3(21)(A)(ii), such fees or other compensation need not come from the plan and should be deemed to include all fees or other compensation incident to the transaction in which the investment advise has been or will be rendered. See A.O. 83–60A (Nov. 21, 1983); Reich v. McManus, 883 F. Supp. 1144 (N.D. Ill. 1995).

(c) *Investment Advice*. Under ERISA section 3(21)(A)(ii), a person is considered a fiduciary with respect to an employee benefit plan to the extent that person "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority to do so * * *." The Department issued a regulation, at 29 CFR 2510.3-21(c), describing the circumstances under which a person will be considered to be rendering "investment advice" within the meaning of section 3(21)(A)(ii). Because section 3(21)(A)(ii) applies to advice with respect to "any moneys or other property" of a plan and 29 CFR 2510.3-21(c) is intended to clarify the application of that section, it is the view of the Department of Labor that the criteria set forth in the regulation apply to determine whether a person renders "investment advice" to a pension plan participant or beneficiary who is permitted to direct the investment of assets in his or her individual account.

Applying 29 CFR 2510.3-21(c) in the context of providing investment-related information to participants and beneficiaries of participant-directed individual account pension plans, a person will be considered to be rendering "investment advice," within the meaning of ERISA section 3(21)(A)(ii), to a participant or beneficiary only if: (i) the person renders advice to the participant or beneficiary as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property (2510.3–21(c)(1)(i); and (ii) the person, either directly or indirectly, (A) has discretionary authority or control with respect to purchasing or selling securities or other property for the participant or beneficiary (2510.3–21(c)(1)(ii)(A)), or (B) renders the advice on a regular basis to the participant or beneficiary, pursuant to a mutual agreement, arrangement or understanding (written or

otherwise) with the participant or beneficiary that the advice will serve as a primary basis for the participant's or beneficiary's investment decisions with respect to plan assets and that such person will render individualized advice based on the particular needs of the participant or beneficiary (2510.3– 21(c)(1)(ii)(B)).[4]

Whether the provision of particular investment-related information or materials to a participant or beneficiary constitutes the rendering of "investment advice," within the meaning of 29 CFR 2510.3–21(c)(1), generally can be determined only by reference to the facts and circumstances of the particular case with respect to the individual plan participant or beneficiary. To facilitate such determinations, however, the Department of Labor has identified, in paragraph (d), below, examples of investment-related information and materials which if provided to plan participants and beneficiaries would not, in the view of the Department, result in the rendering of "investment advice" under ERISA section 3(21)(A)(ii) and 29 CFR 2510.3-21(c).

(d) *Investment Education*. For purposes of ERISA section 3(21)(A)(ii) and 29 CFR 2510.3-21(c), the Department of Labor has determined that the furnishing of the following categories of information and materials to a participant or beneficiary in a participant-directed individual account pension plan will not constitute the rendering of "investment advice," irrespective of who provides the information (*e.g.*, plan sponsor, fiduciary or service provider), the frequency with which the information is shared, the form in which the information and materials are provided (*e.g.*, on an individual or group basis, in writing or orally, or via video or computer software), or whether an identified

[4] This IB does not address the application of 29 CFR 2510.3–21(c) to communications with fiduciaries of participant-directed individual account pension plan plans.

category of information and materials is furnished alone or in combination with other identified categories of information and materials.

(1) *Plan Information*. (i) Information and materials that inform a participant or beneficiary about the benefits of plan participation, the benefits of increasing plan contributions, the impact of preretirement withdrawals on retirement income, the terms of the plan, or the operation of the plan; or

(ii) information such as that described in 29 CFR 2550.404c-1(b)(2)(i) on investment alternatives under the plan (*e.g.*, descriptions of investment objectives and philosophies, risk and return characteristics, historical return information, or related prospectuses).[5]

The information and materials described above relate to the plan and plan participation, without reference to the appropriateness of any individual investment option for a particular participant or beneficiary under the plan. The information, therefore, does not contain either "advice" or "recommendations" within the meaning of 29 CFR 2510.3-21(c)(1)(i). Accordingly, the furnishing of such information would not constitute the rendering of "investment advice" for purposes of section 3(21)(A)(ii) of ERISA.

(2) *General Financial and Investment Information*. Information and materials that inform a participant or beneficiary about: (i) General financial and investment concepts, such as risk and return, diversification, dollar cost averaging, compounded return, and tax deferred investment; (ii) historic differences in rates of return between

[5] Descriptions of investment alternatives under the plan may include information relating to the generic asset class (*e,g.*, equities, bonds, or cash) of the investment alternatives. 29 CFR 2550.404c-1(b)(2)(i)(B)(*1)(ii*).

different asset classes (*e.g.*, equities, bonds, or cash) based on standard market indices; (iii) effects of inflation; (iv) estimating future retirement income needs; (v) determining investment time horizons; and (vi) assessing risk tolerance.

The information and materials described above are general financial and investment information that have no direct relationship to investment alternatives available to participants and beneficiaries under a plan or to individual participants or beneficiaries. The furnishing of such information, therefore, would not constitute rendering "advice" or making "recommendations" to a participant or beneficiary within the meaning of 29 CFR 2510.3–21(c)(1)(i). Accordingly, the furnishing of such information would not constitute the rendering of "investment advice" for purposes of section 3(21)(A)(ii) of ERISA.

(3) *Asset Allocation Models*. Information and materials (*e.g.*, pie charts, graphs, or case studies) that provide a participant or beneficiary with models, available to all plan participants and beneficiaries, of asset allocation portfolios of hypothetical individuals with different time horizons and risk profiles, where: (i) Such models are based on generally accepted investments theories that take into account the historic returns of different asset classes (*e.g.*, equities, bonds, or cash) over define periods of time; (ii) all material facts and assumptions on which such models are based (*e.g.*, retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates, and rates of return) accompany the models; (iii) to the extent that an asset allocation model identifies any specific investment alternative available under the plan, the model is accompanied by a statement indicating that other investment alternatives having similar risk and return characteristics may be available under the plan and identifying where

information on those investment alternatives may be obtained; and (iv) the asset allocation models are accompanied by a statement indicating that, in applying particular asset allocation models to their individual situations, participants or beneficiaries should consider their other assets, income, and investments (*e.g.*, equity in a home, IRA investments, savings accounts, and interests in other qualified and non-qualified plans) in addition to their interests in the plan.

Because the information and materials described above would enable a participant or beneficiary to assess the relevance of an asset allocation model to his or her individual situation, the furnishing of such information would not constitute a "recommendation" within the meaning of 29 CFR 2510.3–21(c)(1)(i) and, accordingly, would not constitute "investment advice" for purposes of section 3(21)(A)(ii) of ERISA. This result would not, in the view of the Department, be affected by the fact that a plan offers only one investment alternative in a particular asset class identified in an asset allocation model.

(4) *Interactive Investment Materials*. Questionnaires, worksheets, software, and similar materials which provide a participant or beneficiary the means to estimate future retirement income needs and assess the impact of different asset allocations on retirement income, where: (i) Such materials are based on generally accepted investment theories that take into account the historic returns of different asset classes (*e.g.*, equities, bonds, or cash) over defined periods of time; (ii) there is an objective correlation between the asset allocations generated by the materials and the information and data supplied by the participant or beneficiary; (iii) all material facts and assumptions (*e.g.*, retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates, and rates of return) which may affect a participant's or beneficiary's assessment of

the different asset allocations accompany the materials or are specified by the participant or beneficiary; (iv) to the extent that an asset allocation generated by the materials identifies any specific investment alternative available under the plan, the asset allocation is accompanied by a statement indicating that other investment alternatives having similar risk and return characteristics may be available under the plan and identifying where information on those investment alternatives may be obtained; and (v) the materials either take into account or are accompanied by a statement indicating that, in applying particular asset allocations to their individual situations, participants or beneficiaries should consider their other assets, income, and investments (*e.g.*, equity in a home, IRA investments, savings accounts, and interests in other qualified and non-qualified plans) in addition to their interests in the plan.

The information provided through the use of the above-described materials enables participants and beneficiaries independently to design and assess multiple asset allocation models, but otherwise these materials do not differ from asset allocation models based on hypothetical assumptions. Such information would not constitute a "recommendation" within the meaning of 29 CFR 2510.3-21(c)(1)(i) and, accordingly, would not constitute "investment advice" for purposes of section 3(21)(A)(ii) of ERISA.

The Department notes that the information and materials described in subparagraphs (1)–(4) above merely represent examples of the type of information and materials which may be furnished to participants and beneficiaries without such information and materials constituting "investment advice." In this regard, the Department recognizes that there may be many other examples of information, materials, and educational services which, if furnished to participants and beneficiaries, would not

constitute "investment advice." Accordingly, no inferences should be drawn from subparagraphs (1)–(4), above, with respect to whether the furnishing of any information, materials or educational services not described therein may constitute "investment advice." Determinations as to whether the provision of any information, materials or educational services not described herein constitutes the rendering of "investment advice" must be made by reference to the criteria set forth in 29 CFR 2510. 3-21(c)(1).

(e) *Selection and Monitoring of Educators and Advisors*. As with any designation of a service provider to a plan, the designation of a person(s) to provide investment educational services or investment advice to plan participants and beneficiaries is an exercise of discretionary authority or control with respect to management of the plan; therefore, persons making the designation must act prudently and solely in the interest of the plan participants and beneficiaries, both in making the designation(s) and in continuing such designation(s). See ERISA sections 3(21)(A)(i) and 404(a), 29 U.S.C. 1002 (21)(A)(i) and 1104(a). In addition, the designation of an investment advisor to serve as a fiduciary may give rise to co-fiduciary liability if the person making and continuing such designation in doing so fails to act prudently and solely in the interest of plan participants and beneficiaries; or knowingly participates in, conceals or fails to make reasonable efforts to correct a known breach by the investment advisor. See ERISA section 405(a), 29 U.S.C. 1105(a). The Department notes, however, that, in the context of an ERISA section 404(c) plan, neither the designation of a person to provide education nor the designation of a fiduciary to provide investment advice to participants and beneficiaries would, in itself, give rise to fiduciary liability for loss, or with respect to any breach of part 4 of title I of ERISA, that is the direct and necessary result of a

participant's or beneficiary's exercise of independent control. 29 CFR 2550.404c–1(d). The Department also notes that a plan sponsor or fiduciary would have no fiduciary responsibility or liability with respect to the actions of a third party selected by a participant or beneficiary to provide education or investment advice where the plan sponsor or fiduciary neither selects nor endorses the educator or advisor, nor otherwise makes arrangements with the educator or advisor to provide such services.

Subchapter B—Definitions and Coverage under the Employee Retirement Income Security Act of 1974

PART 2510—DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, AND G OF THIS CHAPTER

1. The authority citation for part 2510 continues to read as follows:

Authority: 29 U.S.C. 1002(2), 1002(21), 1002(37), 1002(38), 1002(40), 1031, and 1135; Secretary of Labor's Order 1–2011, 77 FR 1088 (Jan. 9, 2019); Secs. 2510.3–21, 2510.3–101 and 2510.3–102 also issued under Sec. 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 237 (2012). EO 12108, 22 FR 1065 (Jan. 3, 1979) and 29 U.S.C. 1135 note. Section 2510.3–38 is also issued under Pub. L. 105–72, Sec. 1(b), 111 Stat. 1457 (1997).

2. Revise § 2510.3–21 to read as follows:

§ 2510.3–21

(a)–(b) [Reserved]

(c) *Investment advice*. (1) A person shall be deemed to be rendering "investment advice" to an employee benefit plan, within the meaning of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (the Act) and this paragraph, only if:

(i) Such person renders advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and

(ii) Such person either directly or indirectly (*e.g.*, through or together with any affiliate)—

(A) Has discretionary authority or control, whether or not pursuant to agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan; or

(B) Renders any advice described in paragraph (c)(1)(i) of this section on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

(2) A person who is a fiduciary with respect to a plan by reason of rendering investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or having any authority or responsibility to do so, shall not be deemed to be a

fiduciary regarding any assets of the plan with respect to which such person does not have any discretionary authority, discretionary control or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(i) Exempt such person from the provisions of section 405(a) of the Act concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(ii) Exclude such person from the definition of the term "party in interest" (as set forth in section 3(14)(B) of the Act) with respect to any assets of the plan.

(d) *Execution of securities transactions*. (1) A person who is a broker or dealer registered under the Securities Exchange Act of 1934, a reporting dealer who makes primary markets in securities of the United States Government or of an agency of the United States Government and reports daily to the Federal Reserve Bank of New York its positions with respect to such securities and borrowings thereon, or a bank supervised by the United States or a State, shall not be deemed to be a fiduciary, within the meaning of section 3(21)(A) of the Act, with respect to an employee benefit plan solely because such person executes transactions for the purchase or sale of securities on behalf of such plan in the ordinary course of its business as a broker, dealer, or bank, pursuant to instructions of a fiduciary with respect to such plan, if:

(i) Neither the fiduciary nor any affiliate of such fiduciary is such broker, dealer, or bank; and

(ii) The instructions specify (A) the security to be purchased or sold, (B) a price range within which such security is to be purchased or sold, or, if such security is issued by an open-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1, et seq.), a price which is determined in accordance with Rule 22c–1 under the Investment Company Act of 1940 (17 CFR 270.22c–1), (C) a time span during which such security may be purchased or sold (not to exceed five business days), and (D) the minimum or maximum quantity of such security which may be purchased or sold within such price range, or, in the case of a security issued by an open-end investment company registered under the Investment Company Act of 1940, the minimum or maximum quantity of such security which may be purchased or sold, or the value of such security in dollar amount which may be purchased or sold, at the price referred to in paragraph (d)(1)(ii)(B) of this section.

(2) A person who is a broker-dealer, reporting dealer, or bank which is a fiduciary with respect to an employee benefit plan solely by reason of the possession or exercise of discretionary authority or discretionary control in the management of the plan or the management or disposition of plan assets in connection with the execution of a transaction or transactions for the purchase or sale of securities on behalf of such plan which fails to comply with the provisions of paragraph (d)(1) of this section, shall not be deemed to be a fiduciary regarding any assets of the plan with respect to which such broker-dealer, reporting dealer or bank does not have any discretionary authority, discretionary control or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to

render such investment advice, provided that nothing in this paragraph shall be deemed to:

(i) Exempt such broker-dealer, reporting dealer, or bank from the provisions of section 405(a) of the Act concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(ii) Exclude such broker-dealer, reporting dealer, or bank from the definition, of the term "party in interest" (as set forth in section 3(14)(B) of the Act) with respect to any assets of the plan.

(e) *Affiliate and control*. (1) For purposes of paragraphs (c) and (d) of this section, an "affiliate" of a person shall include:

(i) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person;

(ii) Any officer, director, partner, employee or relative (as defined in section 3(15) of the Act) of such person; and

(iii) Any corporation or partnership of which such person is an officer, director or partner.

(2) For purposes of this paragraph, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

Signed at Washington, DC, this ___ day of _____, 2020.

Jeanne Klinefelter Wilson
Acting Assistant Secretary
Employee Benefits Security
Administration
U.S. Department of Labor